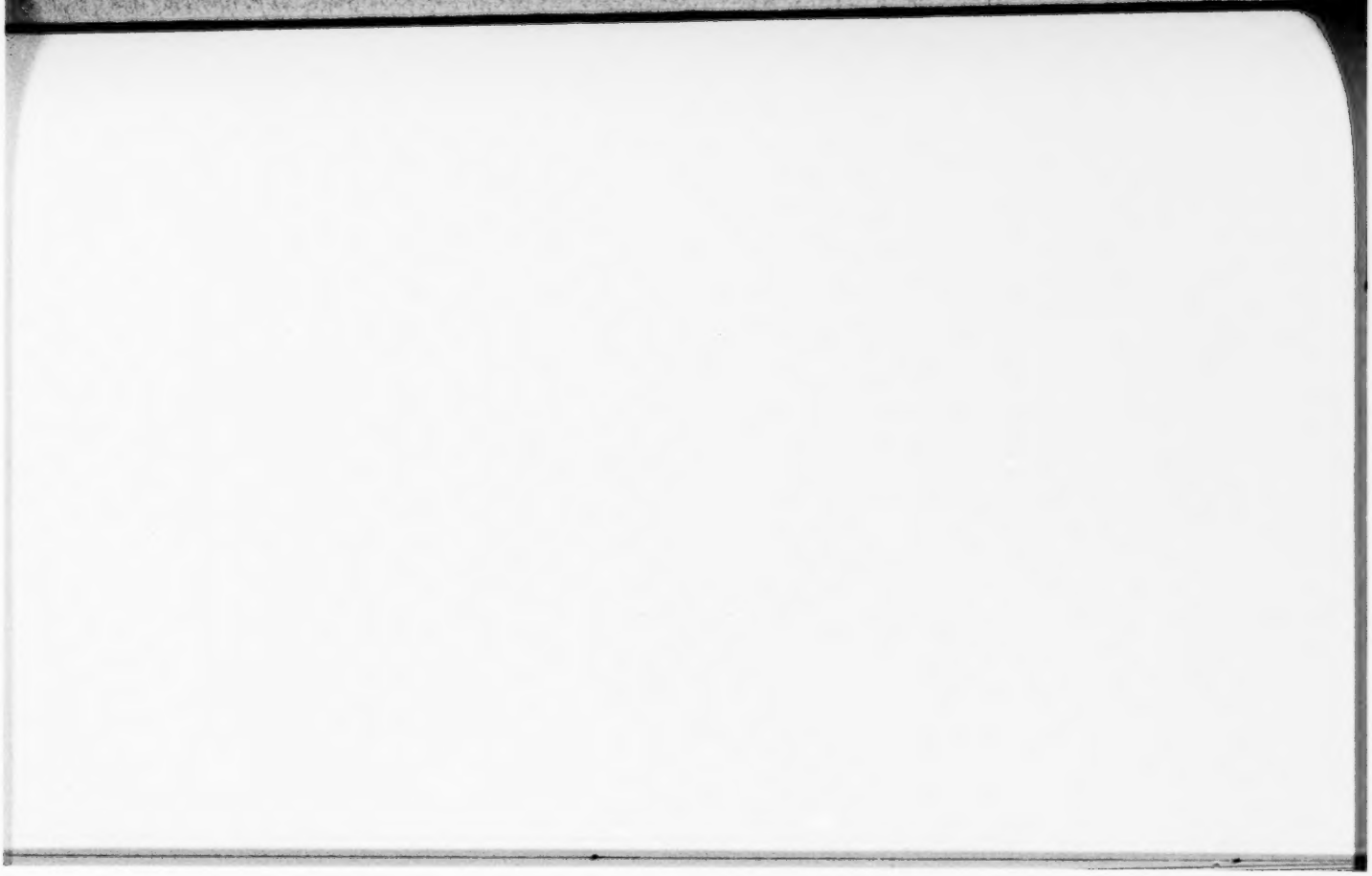

No 1051

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

A. J. JOHNSON, ET AL., *Petitioners,*

v. No.

KERSH LAKE DRAINAGE DISTRICT, ET AL., *Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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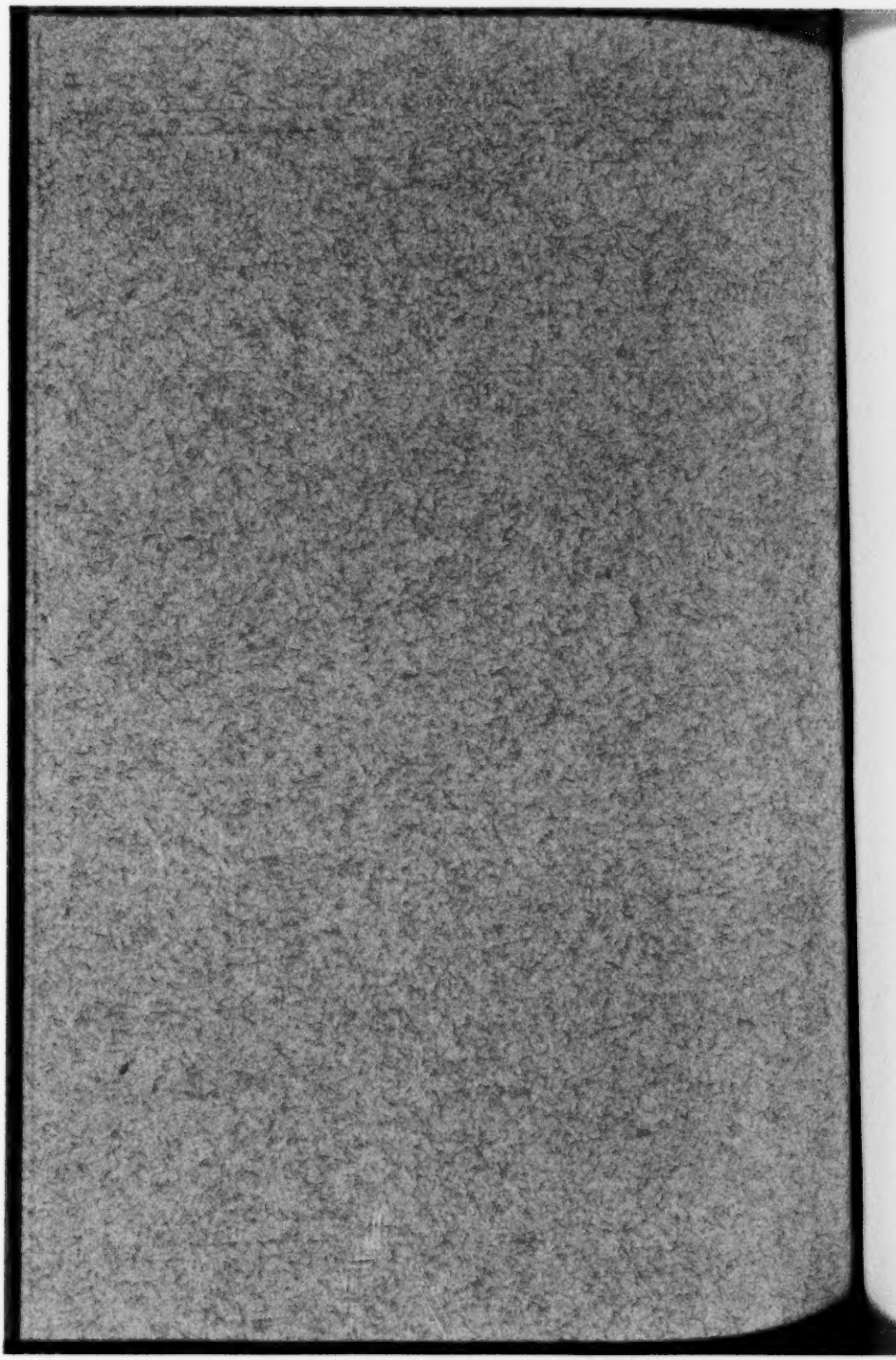

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STATEMENT OF THE CASE

In 1935 creditors of Kersh Lake Drainage District, hereinafter referred to as District, obtained judgment in the amount of $54,655. The judgment was rendered in the United States District Court, hereinafter referred to as District Court. The District appealed. Affirmance followed. See *Kersh Lake Drainage District* v. *State Bank & Trust Company*, 85 F. (2d) 643. The creditors then filed a supplemental suit asking that the commissioners of the District be required to collect taxes and to apply the proceeds on the judgment. In that suit the District contended that the lands which had paid the original assessments in full were exempted of further tax liability. The creditors contended that under applicable statutes of Arkansas, the lands were liable for interest on the original assessments. The creditors prevailed. The District appealed. The judgment of the District Court was affirmed. See *Kersh Lake Drainage District* v. *State Bank & Trust Company*, 92 F. (2d) 783.

Pursuant to directions of the District Court, the commissioners then instituted a suit in the Lincoln Chancery Court, hereinafter referred to as Chancery Court, against delinquent lands. The commissioners themselves owned a substantial portion of the lands involved in the suit. One A. J. Johnson, an attorney, also owned one tract of land involved in the suit. He filed an answer in behalf of himself, the commissioners, and a large number of other landowners. For himself he pleaded a decree of the Chancery Court rendered in October, 1931, in a suit which he had filed against the District. This decree exempted his tract of 160 acres from further tax liability on the theory that interest was not collectible on the assessment. In behalf of the commissioners as individual landowners and a large number of other landowners, he pleaded a decree of the Chancery Court rendered in June, 1932, in a suit filed by W. A. Fish, *et al.*, against the District. This suit involved hundreds of tracts of land containing more than two-thirds of the acreage of the entire District. The decree, like that in the prior Johnson suit, enjoined the District from collecting interest on the original assessments. Both decrees were pleaded in bar of the District's asserted right to collect interest on assessments. In response the District pleaded the decree of the District Court as affirmed by the Circuit Court of Appeals, Eighth Circuit, which held that interest was collectible. The Chancery Court sustained the plea of the District holding that the decree of the District Court, being the last in point of time, was *res adjudicata* of the issue as to the collectibility of interest. Johnson and the other landowners, including the three commissioners of the District, appealed to the Supreme Court of Arkansas, hereinafter referred to as Supreme Court. There it was held that the Johnson and the Fish decrees were special defenses for special groups of landowners, and that such defenses had not

been invalidated by the decree which had been rendered in favor of the creditors in the District Court. See *Johnson* v. *Kersh Lake Drainage District*, 198 Ark. 743, 131 S. W. 2d 620.

The creditors then applied to the District Court asking that the Commissioners be required, in the name of the District, to petition this Court for a writ of certiorari on the ground that certain constitutional rights had been infringed. The commissioners as individual landowners who had profited by the decision of the Supreme Court resisted the efforts to obtain a review. The District Court, however, ordered the District to apply for the writ. Such a writ was issued, but after a hearing on the merits the judgment of the Supreme Court was affirmed. See *Kersh Lake Drainage District* v. *Johnson, et al.*, 309 U. S. 485. In essence the holding of this Court was that the proceedings in the Supreme Court measured up to the requirements of the Constitution of the United States. In the light of that holding, the litigation was returned to the State court in order that it might there shape itself and take such course as might be appropriate under State law.

In the record on the first appeal to the Supreme Court there were no allegations or proof of fraud. Counsel for the creditors who briefed the case for the District merely argued that because the Fish decree on its face showed that the commissioners as individuals were beneficiaries, the decree was void. The Supreme Court held that this was not sufficient to invalidate the decree. With respect to that conclusion of the Supreme Court, this Court said:

> "It is sufficient to state as to this contention that the issues of fraud and collusion raise no question which the Supreme Court of Arkansas was not competent finally to decide."

Kersh Lake Drainage District v. *Johnson, supra*, p. 492.

The Supreme Court also stated in its opinion that fraud, even if it existed, could be utilized only in a direct attack on the decree. This Court said:

> "* * * And the Supreme Court of Arkansas points out that under controlling Arkansas law the Chancery decrees 'could only have been set aside on appeal or by direct action to annul them on the ground of fraud, and as we have said no appeals were taken, and no fraud on the court in which the decrees were rendered, is reflected by this record' " (p. 492).

The direct attack to which the Supreme Court referred was one specifically provided by statute. Excepting the remedy by appeal which must be perfected in six months, this statute provides the only means by which a decree may be nullified after the lapse of the term during which it was rendered. The relevant provisions appear in Sections 8246, 8248 and 8249 of Pope's Digest of the Statutes of Arkansas and read as follows:

> "Section 8246. Grounds for vacating or modifying. The court in which a judgment or final order has been entered or made shall have power, after the expiration of the term, to vacate or modify such judgment or order:
>
> * * *
>
> "Fourth: For fraud practiced by the successful party in obtaining the judgment or order.
>
> "Seventh: For unavoidable casualty or misfortune preventing the party from appearing or defending.
>
> "Section 8248. Procedure to vacate or modify. The proceedings to vacate or modify the judgment or order on the grounds mentioned in the fourth, fifth, sixth, seventh and eighth subdivisions of Section 8246 shall be by complaint, verified by affidavit, setting forth the

judgment or order, the grounds to vacate or modify it, and the defense to the action if the party applying was defendant. On the complaint a summons shall issue and be served, and other proceedings had as in an action by proceedings at law.

"Section 8249. A judgment shall not be vacated on motion or complaint until it is adjudged that there is a valid defense to the action in which the judgment is rendered, or, if the plaintiff seeks its vacation, that there is a valid cause of action; and where a judgment is modified, all liens and securities obtained under it shall be preserved to the modified judgment."

The mandate of this Court duly reached the Supreme Court. The mandate of the Supreme Court in turn reached the Chancery Court. It directs the Chancery Court to enter a decree "not inconsistent with the opinion herein delivered" (R. 6).

It is an elementary rule that one who pleads *res adjudicata* has the burden of establishing such a defense. In the first trial, Johnson, the commissioners, and the other landowners never reached the point where they were required to prove their case on *res adjudicata*. Before they were ready to assume that burden the Chancery Court held that regardless of any decrees which they might offer, the decree pleaded by the District, the one which had been lately rendered in the District Court, was conclusive. On appeal the Supreme Court said that the District Court decree was no barrier, and the cause was remanded in order that the landowners might offer the decrees of 1931 and 1932 in support of their plea of *res adjudicata*. There was no question concerning the efficacy of the Johnson decree of October, 1931, to sustain his plea of *res adjudicata*. It was then conceded, and at all times since has been conceded, that he was entitled to a final decree exempting his tract of 160 acres from further taxation. He

has been accorded all relief which he obtained in the first appeal to the Supreme Court and the subsequent review by this Court. All of those who relied upon the Fish decree of 1932, however, had no such clear-cut right to relief. Upon examining the so-called copy of the Fish decree which Attorney Johnson had attached to the answer as an exhibit, it was discovered that it was not a true copy. It omitted material parts. These omissions made it unintelligible. By its express terms, certain tracts of land were excluded from its protective provisions. In the so-called copy of the decree which was attached as an exhibit to the answer, the excluded lands could not be definitely ascertained. In both the original and the so-called copy, which was used as an exhibit, it was noticeable that some of the descriptions used the word "part," and under Arkansas law this rendered them void for uncertainty.

Under such conditions, the creditors thought it advisable to file an amendment which would (a) point out the void descriptions; (b) point out the lands expressly excluded from the protective terms of the decree; and (c) attack the decree on the ground of fraud. In fact it was not necessary to file any amendment with respect to (a) and (b) for the landowners, upon presenting the Fish decree as proof would necessarily have to reveal the express exceptions and the void descriptions, provided they offered a true copy of the decree. The creditors then applied to the District Court asking that the commissioners be directed to file an amendment embracing (a), (b) and (c). The commissioners, as individual landowners, stoutly resisted the application. They contended that the District Court should not force them to "stultify" themselves by alleging their own fraud. They contended that the trial court should enter a decree relieving all lands of tax liability; notwithstanding the express excep-

tions in the Fish decree, and notwithstanding the obviously void descriptions. The District Court sustained the creditors as to (a) and (b), but sustained the commissioners as to (c). The order contains this recital:

> "Nothing herein shall be construed as preventing the creditors of the District from intervening in the pending suit or filing any other suit which to them may seem advisable" (R. 9).

In the foreclosure suit, the District, under compulsion, filed an amendment setting up the specified defects in the Fish decree (R. 6-8). The commissioners and the other landowners filed a combination motion to strike and answer (R. 14). It is significant that they did not object then, as they do now, on the specific ground that leave to amend would first have to be obtained from this court. It is significant that petitioners asked leave to amend so as to include lands in Section 10 which were inadvertently omitted from the copy of the Fish decree which they attached as an exhibit to their answer (R. 16). At that time they evidently thought the right to amend was to be tested under Arkansas law. The foreclosure suit came on for hearing on July 11, 1940. The Chancery Court disregarded the matters set up in the amendment and rendered a decree releasing all lands in the Fish decree from further taxes, regardless of void descriptions or express exceptions (R. 17). The District, under compulsion, then appealed to the Supreme Court. The appeal was lodged on January 9, 1941 (R. 47). It will be observed that the trial in the Chancery Court and the second appeal to the Supreme Court were but subsequent steps in the same case which had previously been before the Supreme Court and this Court.

We turn now to the other suit. The commissioners having refused to allow the District to file suit alleging their

fraud in the procurement of the Fish decree, the creditors, acting pursuant to the reservation contained in the order of the District Court hereinabove quoted, on September 24, 1940, filed an independent proceeding under the statute to vacate the Fish decree. The complaint, in substance, alleges that instead of appealing from the decree which had been obtained by Johnson in October, 1931, the commissioners of the District agreed with him that they would not appeal if he would file a similar suit and obtain the same relief for their lands as he had obtained for his land; that they agreed to use funds of the District in order to provide an audit which would facilitate the entry of such a decree; and that they had allowed it to be entered clandestinely and with a view of cheating the creditors of the District (R. 24). The commissioners and the other landowners answered. They pleaded the prior proceeding in the foreclosure suit, both in the Supreme Court and in this Court, as *res adjudicata* (R. 36). They did not suggest then as they do now that a suit of this nature could not be filed without first having obtained leave from this Court. Proof was taken. The rapacity of the commissioners and their betrayal of the creditors were clearly established. The suit came on for trial on March 21, 1941. The Chancery Court decided in favor of the defendants. The creditors appealed. The appeal was lodged in the Supreme Court on May 26, 1941 (R. 47).

At this stage both suits were before the Supreme Court. It was then evident that if the decree of the Chancery Court in the creditors' suit should be reversed, then the Fish decree would stand vacated, and it would no longer have vitality as the basis for a plea of *res adjudicata* in the foreclosure suit. Consequently the two suits were consolidated. Upon the undisputed evidence in the record in the creditors' suit,

the Supreme Court found that the commissioners had acted dishonestly in permitting the Fish decree to be entered, in declining to perfect an appeal, and in concentrating the tax burden of the District on the remaining lands which were not involved in the Fish suit (R. 48-59). As the Fish decree had been vitiated, there was no occasion for the court to pass upon the amendment which had been filed in the foreclosure suit. The court still having control of the foreclosure suit, it had the right to make such orders therein as seemed to be appropriate. In view of the holding in the creditors' suit, there could be no termination of the foreclosure suit other than by reversal with directions to ignore the Fish decree and tax all lands equally.

So petitioners stand defeated in the very court which had previously sustained them, but they are reluctant to surrender the fruits of their proven rascality.

ARGUMENT

1.

AMENDMENT OF PLEADINGS AFTER REMAND

It is said that the Chancery Court could not permit an amendment of the pleadings without leave of this Court. If that were so, then in every instance of a review of a State court decision on certiorari, this Court would be called upon to supervise all subsequent procedural steps. The incongruity of such a practice repels acceptance of the idea. Petitioners, at page 19 of their brief, have cited various decisions of this Court which hold that inferior courts must comply with the express directions contained in the mandate. Such a rule must necessarily exist in all systems of law having a court of last resort. If any of the subsequent proceedings in the State court were violative of the terms or the spirit of the mandate, then they cannot stand. When the record was here before, there were neither allegations nor proof of fraud, and the creditors' suit which resulted in the vacation of the Fish decree was not in contemplation. Under such conditions the language of the mandate should be read in the light of the issues which were here for decision. The particular points pressed here by the creditors, respondents now, were that the proceedings up to that point infringed certain constitutional rights. The directory provisions of the mandate naturally would be confined to the precise points decided in this Court.

Petitioners cite cases which hold that after remand a bill of review on the ground of newly discovered evidence may be filed only after leave has been obtained from the appellate court. Undoubtedly, that is the rule in the Federal Courts; but that is not the rule which is applied in Arkansas. There permission to file a bill of review need not be obtained from

the appellate court. If the ground is newly discovered evidence, leave is obtained from the trial court. If the ground is error apparent, the bill may be filed as a matter of right.

The following excerpt is taken from the case of *Long* v. *Long*, 104 Ark. 562, 149 S. W. 662:

> "As a bill of review, it was sought to annul the former decree for errors apparent on the record, and also for newly discovered evidence. In order to file a bill of review based on newly discovered evidence, it is necessary to first obtain leave of the court in which the decree was rendered. But it is not necessary to obtain such leave of the court where the bill of review is founded on errors of law apparent on the face of the record. *Cornish* v. *Keese*, 21 Ark. 528; *White* v. *Holman*, 32 Ark. 753; *Wood* v. *Wood*, 59 Ark. 441" (p. 567).

Review was allowed here to make certain that constitutional guaranties had not been ignored. That secured, it would seem that the case, with its status unaltered in other respects, should go back to the jurisdiction and the body of law from whence it came. It is inconceivable that because this Court should review a State court decision by certiorari, the case on remand would be marked for a procedural course different from that laid out for all other cases in the same court. It is significant that petitioners in the State court never once suggested by pleadings or argument that leave of this Court was a prerequisite for amendment of the pleadings or for the institution of a plenary suit attacking the Fish decree. They felt no hesitancy in amending their answer without first asking permission (R. 16).

In *Steinfeld* v. *Zeckendorf*, 239 U. S. 26, the appeal came to this Court while Arizona was a territory, but before the decision it had become a state. The case was "remanded for such further proceedings as may not be inconsistent with

the opinion." That language, Judge Holmes said, was "the formula usual in cases coming from a State." Then he added:

> "* * * But apart from technical objections that have been urged the only question that would be open is whether the judgment below was inconsistent with the opinion of this court, and as it very plainly is not, there is no reason for disturbing it. *Our mandate was not concerned with the allowance of attorneys' fees and some other matters that were argued, and therefore they present no Federal question and need not be considered*" (p. 31). (Italics supplied.)

In this instance the mandate was not concerned with the sufficiency of the exhibit attached to the answer filed by the landowners to support their plea of *res adjudicata;* and it was not concerned with the results which might follow if the Supreme Court should later find that the Fish decree was fraudulent and hold that it should be uprooted. The happenings in the State court subsequent to the review by this Court present no Federal questions. This Court, in the first appeal, stated that there was no violation of the due process clause; that the creditors were bound by the decrees "unless there was fraud or collusion," and that the judgment of the District Court had not been denied full faith and credit. The Johnson decree has been given effect. The Fish decree has subsequently been invalidated for fraud. It is evident that the mandate of this Court has not been disobeyed, and that the only questions now raised are of a non-Federal nature.

Southern Railway Company v. *Kentucky*, 284 U. S. 338, involved franchise taxes imposed by the State of Kentucky. The State court fixed certain valuations for assessing the taxes. On appeal this Court reversed on the ground that the additional values attributed to a certain 127.03 miles of rail-

road were so excessive and arbitrary as in reality to include property outside of Kentucky, and that enforcement would violate the due process clause of the Fourteenth Amendment. Upon remand, Kentucky amended its petition so as to claim, in addition to its earlier demands, franchise taxes with respect to Kentucky mileage of Cincinnati, New Orleans & Texas Pacific Railway. Unlike petitioners here, the railway company objected in the trial court on the ground that the amendment was in conflict with the mandate. We quote from the opinion:

> "* * * Appellants maintained below that the proceedings were in conflict with our mandate and that to enforce the taxes claimed would be to tax property outside the Commonwealth" (p. 340).

As to the propriety of the amendment, this Court said:

> "Our former decision merely held that the particular application of the state statute then under consideration was repugnant to the due process clause. The judgment now before us is based on a different claim. The remanding of the case by the court of appeals and the filing of an amended petition in the circuit court by the Commonwealth and the trial thereon were not inconsistent with the mandate of this court. *Mutual Life Ins. Co.* v. *Hill*, 193 U. S. 551, 553. *Wolff Packing Co.* v. *Industrial Court*, 267 U. S. 552, 562" (p. 341).

That language is well fitted to this situation. On the first appeal this Court merely held that the particular proceedings in the State court did not, as to creditors, violate the due process clause of the Fourteenth Amendment or the full faith and credit clause of the Constitution. The judgment now under review is based on a different claim. By an independent suit it has been shown that the Fish decree was a product of fraud, and such suit was filed long after this Court's mandate was filed in the Supreme Court.

If this Court should be of the opinion that the amendments which were made in the State court could only be made with its permission or that respondents should have sought leave here before attacking the Fish decree for fraud, then they ask that they now be allowed to file the appropriate applications. Such procedure seems to us to have been sanctioned by this Court in the case of *In Re: Potts*, 166 U. S. 263, one of the authorities cited by petitioners.

II.

IS THE JUDGMENT OF THIS COURT IN KERSH LAKE DRAINAGE DISTRICT v. JOHNSON, 309 U. S. 485, *RES ADJUDICATA* OF ALL THE ISSUES INVOLVED?

If that question is answered in the affirmative, then the judgment of this Court froze the litigation at that stage and deprived Arkansas litigants of a well-defined statutory remedy which is not affected by any statute of limitations. The rule of *res adjudicata* was developed for the salutary purpose of giving finality to judgments after an opportunity had been given the litigants to settle all controvertible issues. It was not designed as a shield for the protection of fraud. The only way in which the Fish decree could be scrutinized for fraud was by the special statutory proceeding. Such a proceeding ordinarily could be invoked only by the party to the suit who had suffered from the fraud of an adversary. In the Fish suit the commissioners of the District and other landowners were plaintiffs. As commissioners they defended the suit in the name of the District. To obtain relief under the statute, the District would have to sue the landowners, including the commissioners, alleging fraud and a meritorious defense. Naturally, the commissioners who participated in the fraud and who profited by the terms of the Fish decree

would not, in the name of the District, compel themselves to disgorge. That is why no suit under the statute had been commenced prior to the first appeal.

At page 21 of their brief, petitioners say:

> "If the Fish decree was obtained by fraud, the respondents had an opportunity to allege and prove the fraud when the decree was pleaded as *res adjudicata.*"

The respondents were not parties to the suit wherein the Fish decree was pleaded as *res adjudicata.* That was an ordinary foreclosure suit. It was filed by the District as plaintiff. The District was dominated by the commissioners. The District pleaded the decree of the District Court, for under the circumstances that could not be avoided. The commissioners and other landowners, in defense to the suit, pleaded the Fish decree. It was not possible at that point to plead any decree setting aside the Fish decree for fraud, for no such suit had even been filed. In the Supreme Court it was argued by the attorneys who represented the creditors and who were permitted to brief the case that the Fish decree, on its face, showed fraud because the commissioners were its principal beneficiaries. The Supreme Court pointed out that the decree could be vitiated only by a direct attack. After the remand, the creditors asked the commissioners, in the name of the District, to file such a suit. They declined. The creditors then filed the suit in their names alleging that although it was the duty of the commissioners to take the initiative and file the suit, they had declined to do so (R. 26). Before losing control of the foreclosure suit, the Supreme Court decided the suit attacking the Fish decree. For the first time there was a decree in existence which could be pleaded in opposition to the Fish decree. Surely there can

be no rule of *res adjudicata* which will force the Supreme Court into the awkward position of saying the Fish decree is fraudulent, but we must allow it to protect those who maneuvered its entry because those same persons had not, prior to the institution of the foreclosure suit, voluntarily pursued the statutory remedy which alone could bring about its invalidation.

The cases cited by petitioners do not sustain their arguments. In all of those cases the judgments which supported the pleas of *res adjudicata* had been rendered in separate and distinct proceedings and had become final. Here the appellate court still had control of the foreclosure suit. No final decree had ever been entered.

In *Chicot County Drainage District* v. *Baxter State Bank, et al.*, 308 U. S. 371, the judgment which supported the plea of *res adjudicata* was entered in 1936 in a proceedings under the Act of May 24, 1934, providing for Municipal Debt Readjustment. Long after that decree had become final, a bondowner sued the district. In the first action the bondowner was a party and could have pleaded the invalidity of the Act of May 24, 1934, but failed to do so. In the second suit the bondholder sought to plead the unconstitutionality of the Act. It was held that the judgment in the readjustment proceeding which had long since become final was *res adjudicata.*

Cromwell v. *County of Sac*, 94 U. S. 351, also dealt with a judgment which had become final, but the opinion discusses a phase of the rule of *res adjudicata* which is applicable here. From the opinion:

> "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar

> or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action * * * (p. 352).
>
> "But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered" (p. 353).

This distinction was argued in the brief submitted to the Supreme Court. Even had the rule of *res adjudicata* been applicable on the second appeal in the same case, this distinction would have been fatal to the petitioners, for it is evident that the decree which resulted from the direct attack on the Fish decree was a "different claim or demand" from any defense which was pleaded in the foreclosure suit. Necessarily, it was a different claim because the decree which adjudged the Fish decree to be invalid was not in existence at the time the foreclosure suit was instituted.

In *Baltimore Steamship Company* v. *Phillips*, 274 U. S. 316, another of the authorities cited by petitioners, the court said:

> "* * * A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause" (p. 325).

The judgment of the Supreme Court on the first appeal was voidable. It was not open to collateral attack, but it could be corrected by direct review, and it was corrected by direct review. No final judgment had ever been entered at

the time the Fish decree was invalidated. Law of the case and *stare decisis* could raise nothing more than non-Federal questions.

In *Grubb* v. *Public Utilities Commission*, 281 U. S. 470, this comment is found:

> "* * * the appellant must abide by the rule that a judgment upon the merits in one suit is *res adjudicata* in another where the parties and the subject are the same," etc. (p. 479).

This is not an instance of a judgment rendered in one suit being offered in *another suit*. Here there is only one suit. Here petitioners are in the attitude of offering a judgment entered at one stage of the proceeding as being conclusive of a different judgment on an additional showing of facts at a subsequent stage of the same proceeding. The difference is fundamental.

In *McIntosh* v. *Wiggins*, (C.C.A. 8) 123 F. (2d) 316, a headnote reads as follows:

> "A judgment which is wrong but unreversed and unmodified is just as effective as a judgment which is right."

Here the first judgment of the Supreme Court was wrong, but it cannot be classified as "unreversed and unmodified."

Other decisions of this Court quite plainly show that a judgment entered at one stage of a proceeding cannot be urged as *res adjudicata* to the entry of another judgment at a subsequent stage of the same proceeding.

Wichita County v. *City Bank*, 306 U. S. 103, is in point.

Suit was filed by a Texas bank in the State court. Judgment was entered in favor of the defendant on its cross-action. The Supreme Court of Texas reversed and remanded for a new trial, expounding the applicable law. In the meantime, the bank became insolvent, a liquidator was appointed, and its assets were turned over to another bank. The proceeding was then removed to the United States District Court. On trial there recovery on the notes was denied the insolvent bank, but jurisdiction was retained for winding up its affairs. The Circuit Court of Appeals set aside the decree because the District Court failed to make specific findings of fact and conclusions of law. In remanding, the Circuit Court of Appeals, for the guidance of the trial court, stated principles of law which it thought to be applicable. These were at variance with the State law. The Circuit Court of Appeals had assumed that as the litigation involved a commercial transaction, the Federal law would apply. *Erie Railroad Company* v. *Tompkins,* 304 U. S. 64, was then decided, and on a second petition for rehearing the Circuit Court of Appeals disclaimed any purpose of declining to follow the Texas law, but said its opinion was in harmony with the rule announced by the Texas court in a later case. Review was sought in this Court on the ground that it was the duty of the Circuit Court of Appeals to apply the Texas law as it stood at the time of the rendition of the first judgment of reversal by the Texas appellate court. From the opinion:

> "In departing from the 'law of the case,' as announced by the state court, and applying a different rule, the court below correctly stated that by reason of the removal it had been substituted for the Texas Supreme Court as the appropriate court of appeal and that it was its duty to apply the Texas law as the Texas court would have declared and applied it on a second appeal if the cause had not been removed. It was the duty of the federal court to apply the law of Texas as declared by its

highest court. *Erie Railroad Co.* v. *Tompkins, supra.* **But the case on the first appeal had not become *res adjudicata.*** *Remington* v. *Central Pacific R. Co.,* 198 U. S. 95, 99, 100; *Messenger* v. *Anderson,* 225 U. S. 436, 444; *Diaz* v. *Patterson,* 263 U. S. 399, 402; *Seagraves* v. *Wallace,* 69 F. 2d 163, 164, 165. And since the Supreme Court of Texas holds itself free upon reconsideration to modify or recede from its own opinions, see *Quanah, Acme & Pacific Ry. Co.* v. *Wichita State Bank & Trust Co., supra,* superseding 89 S. W. 2d 385, the court below, in applying the local law, was likewise free to depart from the earlier rulings to the extent that examination of the later opinions of the Texas Supreme Court showed that it had modified its opinion on the first appeal. Hence the only question for our decision is whether the Court of Appeals rightly concluded that the state court had thus altered its opinion" (p. 107). (Emphasis supplied.)

In *Messenger* v. *Anderson,* 225 U. S. 436, the question was the proper construction of a will. The contest had gone to the Circuit Court of Appeals, Sixth Circuit, on three occasions. In the meantime, the Ohio court had construed the will. On the last appeal the Circuit Court of Appeals declined to change its construction. Mr. Justice Holmes, in delivering the opinion of this Court, said:

"* * * In the absence of statute the phrase, law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, **not a limit to their power.** *King* v. *West Virginia,* 216 U. S. 92, 100. *Remington* v. *Central Pacific R. R. Co.,* 198 U. S. 95, 99, 100. *Great Western Telegraph Co.* v. *Burnham,* 162 U. S. 339, 343" (p. 444). (Emphasis supplied.)

The case of *Seagraves* v. *Wallace,* (C.C.A. 5) 69 F. (2d) 163, cited by this Court in the case of *Wichita County* v. *City Bank, supra,* is convincing authority for the following propositions:

1. When a judgment is affirmed on appeal there is *res adjudicata,* and no power exists after the lapse of the term to alter the judgment. (In the first appeal to the Supreme Court there was no affirmance. There was a reversal of a judgment rendered by the lower court in favor of the creditors.)

2. A judgment of the appellate court binds the lower court as law of the case.

3. Questions within the rule of law of the case, though ordinarily not re-examinable, are not beyond the power of review. Good practice only, and not jurisdiction, is involved.

4. Justice is better than consistency, and an appellate court, so long as it has jurisdiction over the controversy, ought to have power to do justice according to law, and should be eager to correct its own errors.

III.

DID THE SUPREME COURT OF ARKANSAS DENY FULL FAITH AND CREDIT TO THE JUDGMENT OF THIS COURT IN THE JOHNSON CASE?

At page 23 of their brief, petitioners contrast the holdings of this court when the case was here for review with the holdings of the Supreme Court when the case was before it on the second appeal. They ignore all that happened during the intervening period, and by doing so they miss the pivotal question which is now before this Court. That question is whether this Court's opinion and its mandate can be construed as forbidding a consideration by the Supreme Court of a special statutory proceeding which was subsequently commenced and which terminated with the finding that the commissioners, in allowing the Fish decree to be entered, had

violated the rudiments of fair play. The circumstances, the language of this Court's opinion, and the language of its mandate do not justify an affirmative answer.

IV.

SECTION 8246 OF POPE'S DIGEST OF THE STATUTES OF ARKANSAS

The arguments under this subdivision of petitioners' brief are repetitious. They speak of this Court's mandate as if it insured them against the consequences of fraud which might later come to light. They say that the "court by its mandate ordered a decree to be entered in accordance with its judgment." With that we agree. We differ only as to the scope of the judgment. We submit that the only judgment rendered here was that the proceedings then reviewed had conformed to constitutional requirements. We submit that there was nothing in this Court's mandate or judgment evidencing an intention to deprive the Supreme Court of the right to modify a former opinion in the same case, a right which this Court has at all times preserved for itself and other appellate federal courts.

Only non-federal questions arise by reason of the last judgment of the Supreme Court which deprived the petitioners of the temporary success which they gained with a fraudulent decree. We submit that review should be denied.

Respectfully,

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